

What Future for Global Health Governance and the Right to Health in the Era of New Generation Trade and Investment Agreements?

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New generation trade agreements mark a new era in the contentious relationship between the right to health and global trade objectives. This article delineates three of the unique qualities of new generation agreements and the contemporary challenges they pose to the global governance of health. Specifically, new generation agreements encompass new fields not traditionally included in trade deals, enable forum shopping and alternative governance structures, and legitimize corporations as participants in normative and regulatory processes while condoning a new standard of state accountability to corporations. This article examines opportunities to enhance coherence between human rights and new generation trade agreements. These measures include recognizing and complying with the right to health and human rights law in trade agreements, strengthening the policy space to protect and promote health and human rights considerations in trade and investment negotiations, and establishing a Framework Convention on Global Health as a new reference for rights-based global health governance.

INTRODUCTION

New generation trade agreements mark a new era in the contentious relationship between the right to health and global trade objectives. This article explores how new generation trade agreements have encroached on global governance for health and the potential for the fullest enjoyment of the right to health. This paper also examines whether and how international human rights law and principles can bolster global governance for health in light of the challenges posed by new generation trade agreements. The term “new generation trade agreements” emphasizes their novel and far-reaching focus on issues “beyond-the-border,” including investment protection, and regulatory governance. Recent notable examples are the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), which are bilateral or plurilateral trade deals that aim to govern not only the trade in goods, but also investment, trade in services, and regulatory cooperation. Although many aspects of new generation trade agreements have long been part of international trade negotiations, new generation deals i) extend deeper into national policies and affect the governance of services, investment, regulatory principles, and cooperation; ii) have more comprehensive coverage, with a push for top-down and opt-out measures with limited exclusions from these arrangements; and iii) include investment arbitration or dispute settlement and oversight on compliance, consequently strengthening their role and relevance in domestic affairs far beyond that of other international agreements.

The authors first show examples where conflicts have historically emerged between trade and health. The second part of this article investigates the meaning and implications of human rights and the right to health obligations of states in the context of global trade. The third section delineates the unique qualities of new generation trade agreements and the contemporary challenges they pose to the global governance of health. The fourth part identifies opportunities for greater coherence between human rights and new generation trade agreements.

GLOBAL HEALTH GOVERNANCE AND TRADE

In contrast to international development and United Nations (UN) agencies, the World Health Organization (WHO) has a stronger normative role and mandate in global health policy making. WHO inherited specific tasks for medicines standardization, epidemic control, and quarantine measures from the League of Nations and the International Office for Public Health.¹ The role of WHO has always been associated with trade policies, albeit in the context of controlling disease transmission.² Additionally, WHO shares with Food and Agriculture Organization (FAO) of the UN the responsibility for standards, guidelines, and codes of practice adopted by the Codex Alimentarius Commission.³

The establishment of the World Trade Organization (WTO) in 1995 raised concerns about the future of WHO's role in global health governance. These concerns were triggered by questions about the legitimacy of public health measures, and by negotiations on services trade and intellectual property rights. One of the most debated WTO agreements in the field of public health has been the Agreement on Sanitary and Phytosanitary Measures (SPS), which addresses how and on what basis governments can regulate public health matters. Another example is the WTO dispute settlement case on asbestos, a known carcinogen, that directly challenged European occupational health regulation and a ban of asbestos on the basis of the WHO International Agency for the Research on Cancer's (IARC) assessment of carcinogenicity.⁴ The Agreement on Technical Barriers to Trade (TBT) has drawn attention to the labeling of products such as tobacco notably through a trade-related dispute on clove cigarettes.⁵ Services negotiations have resulted in fewer dispute settlement cases under WTO than trade in goods; however, the dispute settlement case on gambling shows that trade-related obligations could have consequences for bans on trade in services, which may be interpreted as setting a zero quota, which would be impermissible under market access requirements.⁶

The most controversial WTO agreement influencing global health governance is the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS). Intellectual property (IP) disputes and concerns about access to medicines have shaped WHO's role and position as a global normative actor in pharmaceutical policy. While some WHO member states and nongovernmental organizations sought a stronger role for WHO on access to medicines and regulation, the pharmaceutical industry and sympathetic member states have opposed this change.⁷ Forum shopping, made possible by the International Conference on Harmonization (ICH), is viewed as a means to limit and counteract WHO's role in standard-setting in pharmaceutical policy.⁸

Conflicts between trade and health priorities have come to a head in the field of tobacco policy. In 2001, the WHO Tobacco Free Initiative published a paper on confronting the tobacco epidemic in the era of trade liberalization.⁹ This contributed to negotiations on the WHO Framework Convention on Tobacco Control, which entered into force in 2005. In 2014, investment liberalization and protection became a new concern for tobacco control.¹⁰ Bilateral trade agreements and so called TRIPS-plus requirements have also become reflected as a concern for health policy and debated under WHO Commissions, intergovernmental working groups, and plans of action on public health and intellectual property rights.¹¹

The negotiation of the FCTC forms the hard end of global health law, as it remains the sole convention negotiated under WHO.¹² The International Health Regulations (IHR) are based on Article 21 and represent legally binding regulations. WHO has also actively engaged with trade-related matters in the field of mobility of health care professionals, where a global code of practice has been negotiated on the international recruitment of healthcare personnel.¹³ While WHO codes have weak enforcement mechanisms, the codes remain authoritative recommendations. WHO codes can help governments legitimize their

action in the context of national regulatory measures to protect public health and their position against powerful corporate or foreign state interests.

In global governance and trade, WTO agreements have become the floor when compared to bilateral and plurilateral agreements, such as the Trade in Services Agreement (TiSA). Bilateral agreements and plurilateral agreements have become vehicles to advance trade terms beyond what has been achieved under WTO agreements, with often implicit or explicit aims to eventually take these under the auspices of WTO. New generation trade agreements have gained the most attention in the context of the recent TTIP and TPP negotiations. This article focuses on TTIP and TPP, as the negotiating texts are accessible and likely to be revisited in the future in other agreements, even though negotiations are currently stalled.

The focus on regulatory cooperation and rules is thus likely to challenge *how* future standards and regulation are set, for which purposes, and on what institutional and legal bases. Thus, while new generation trade agreements may “restore” the right to regulate, they may exert influence on the policy space for governments to regulate for health.¹⁴ As discussion has so far been focused on conflicts between trade and national policy priorities, we seek to point out their role not only in shaping national policies, but influencing where and how global health policies and standard-setting takes place. While they do not “oppose” WHO’s constitutional role, they create an alternative, more strongly enforced regime for global governance, which draws from interests of global industries and priorities of global trade and investor interests.

HUMAN RIGHTS LAW AND RIGHTS TO HEALTH

The right to the highest attainable standard of health, first articulated in the WHO Constitution,¹⁵ is now enshrined in multiple UN treaties, among them the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), which is legally binding on the 165 ratifying states.¹⁶ The right to health, together with all human rights, impose specific obligations on governments and bestow universal entitlements on individuals by virtue of their intrinsic worth and human dignity.

The value of international human rights law to global governance is threefold. First, human rights are inclusive, universal, and interdependent in scope,¹⁷ which allows complex systems of global governance to be refocused through the lens of individuals and whether they can enjoy their right to health. Second, international human rights law is a legally binding set of rules to which governments should be held to account. Legal recognition enhances the permanency of rights, and their implementation and enforcement. Third, a rights-based approach, enshrined in human rights law, considers the individual an active member of decision-making processes rather than a passive consumer, which is often the case in a market-oriented paradigm.¹⁸ Individuals are empowered to take an active role in policymaking, implementation, and enforcement in line with human rights principles of non-discrimination, transparency, consultation/participation, monitoring, accountability, and redress.

The scope of human rights obligations vis-a-vis global trade can be distilled from authoritative “general comments” by the Committee on Economic, Social and Cultural Rights (CESCR), a UN body of human rights experts that interprets and clarifies the scope and content of these entitlements.

The notion that trade agreements must be compatible with and not limit the enjoyment of human rights has persisted in the CESCR’s jurisprudence since 1999.¹⁹ For example, bilateral or multi-layer international agreements could harmonize contributory social security schemes for migrant workers, enhancing social protection for this vulnerable group.²⁰ However, this guidance is not necessarily heeded in practice.

States are instructed to ensure that international agreements they enter into do not adversely impact rights, such as to health or to water.²¹ Human rights violations occur when governments fail to account for these rights in trade deals.²² The CESCR specifically cautions that “agreements concerning trade liberalization should not curtail or inhibit a country’s capacity to ensure the full realization of” the rights to water or to social security.²³ The CESCR has additionally established that any higher protection standards in national or international law, such as for intellectual property, must not impede the enjoyment of other human rights without justification, such as the provision of essential medicines as part of the right to health.²⁴

In contrast to traditional IP-focused trade agreements, the novel terms in new generation trade agreements are largely unaddressed by international human rights law. These human rights obligations are legally binding on states and can be enforced through domestic courts, where permitted by law, and recently in an international forum under the Optional Protocol to the ICESCR, which is described in more detail later.

The CESCR also offers guidance for international organizations and their members. Member states must fully consider the rights to water and social security in the organization’s actions.²⁵ The CESCR encourages the incorporation of international human rights law and principles into the workings of international organizations, and effective cooperation between the WTO and states, specifically to implement the right to health and social security.²⁶

NEW GENERATION TRADE AGREEMENTS AND GLOBAL HEALTH GOVERNANCE

Global trade policies are all too often at odds with national public health interests. In trade negotiations, nation states are set against one another to reach an agreement that is perceived to represent a rules-based compromise between a variety of national interests. Yet less attention has been paid to how new generation trade agreements affect the policy space for health at both the global and the national levels. Indeed, common health policy interests are often in conflict with those of commercial policy.²⁷ Furthermore, new generation trade agreements can be seen to serve corporate interests to the detriment of public health regulation.²⁸ In contrast to the more mundane export interest squabbles, health-related concerns are more systemic and globalized, as national governments pursue universal health coverage and the right to health. Furthermore, the control of antimicrobial resistance and the prevention of epidemics increasingly hinges on well-functioning health care systems. Thus, a global perspective on the conflict between trade and health agendas is warranted. Some global and national health policies aim to restrict and limit commercial activities that are related to the manifestation or transmission of disease, such as tobacco control to prevent non-communicable diseases. Public health policy also aims to ensure a high level of health protection, including for access to medicines and occupational health and safety. Thus, new generation trade agreements and their enlarged focus on regulation have implications for the health policy space at national and global levels.²⁹

New generation trade agreements affect global health governance in three ways: i) expanding the reach of trade agreements to new fields not traditionally encompassed by trade deals (e.g., regulatory cooperation and principles, investment protection, services); ii) enabling forum shopping and alternative governance structures (e.g., International Council for Harmonization of Technical Requirements for Pharmaceuticals for Human Use (ICH), labor, environmental and gender chapters); and iii) legitimizing corporations as participants in normative and regulatory processes while condoning a new standard of state accountability to corporations. The authors will first examine these three aspects before discussing the potential and limits of human rights in this context.

New Generation Trade Agreements as a New Global Constitutional Reference (“Hard Law”)

New generation trade agreements establish frameworks to regulate and protect the interests of global industries on one hand and as means to limit national regulatory policy space that could restrict trade on the other. Indeed, it has been claimed that WTO obligations, or “hard law,” should trump public health policies even in the case of tobacco and the FCTC.³⁰ However, such claims are highly contested. While the challenges for domestic policies are evident,³¹ there is no reason why this should be the case for global agreements and priorities. However, as long as trade negotiations are held from a commercial—rather than a health—perspective, there will be little to contest. In WHO, the challenge of “stagnation” is reflected in lengthy and arduous World Health Assembly meetings, intergovernmental working groups, and inertia concerning normative global health policy issues, most notably with respect to pharmaceuticals.

Negotiations under the services agenda on the mutual recognition of qualifications, the trade in health services and mobility of patients and health providers, and the portability of social insurance are all likely to affect the governance of health systems. While many countries have opted out of including health services under trade agreements, the negative listing of services commitments (or use of more general obligations covering all sectors in new generation agreements) limits the scope for their exclusion.³² Furthermore, new generation trade agreements do little to address or strengthen global regulatory measures for human trafficking and illegal trade in human organs.³³ New generation trade agreements have emphasized the enforcement of IP rights and action on counterfeited goods, while simultaneously complicating the control of falsified and substandard products.

One aspect of the new “hard law” is related to the legitimacy and the practice of investment arbitration. The globalization of investment protection through new generation trade and investment agreements is perhaps the most important aspect of these agreements. Arbitration cases on tobacco,³⁴ access to medicines,³⁵ and health services³⁶ have already challenged domestic public health regulation. However, the greatest ramification for health policy is anticipated to be the resulting regulatory chill and reluctance of governments to act as a result of the threat of arbitration³⁷.

Enabling Forum Shopping (“Competence and Legitimacy”)

As long as trade agreements focus on trade barriers there may be spillover implications. However, regulatory measures or sector-specific chapters in trade agreements transform these deals into alternative forums with far greater implications for global governance.

The ICH is an example of forum shopping enabled through global normative policies.³⁸ While harmonization has its benefits, it can also lead to lower standards when led by commercial—rather than health—priorities³⁹. Furthermore, while the focus of the ICH is currently limited, it has the potential for expanding its relevance in the future. Evidence suggests that enhancement of harmonization has taken place at the expense of safety standards. For example, the ICH management of the regulatory standards for carcinogenicity testing concern reducing the testing requirements, rather than harmonizing inconsistent standards, across regions.⁴⁰ The changing role and legitimacy of the ICH (currently known as International Council for Harmonization) as part of trade policies challenges WHO’s role not only as a forum for the harmonization of limited technical standards, but potentially also its role in establishing broader normative guidelines and priorities in pharmaceutical policy. The European Union will likely promote the ICH in trade agreements due to its close links with the European Commission. However, WHO

matters and health-related regulatory policies remain the territory of member states' ministries of health. The European Union proposal and inclusion of ICH in trade agreements as a main reference organization creates an alternative agency comparable with WHO, which has now become the "residual" option. New generation trade agreements define ICH as the primary agency and avenue for harmonization and guidelines, without reference to the focus of these guidelines. For example, EU proposal for TTIP Article 5 of Annex on medicines requires:

3. The Parties *shall implement all ICH and VICH guidelines unless those would be ineffective or inappropriate for the achievement of their legitimate objectives*. Each Party should duly consider, when developing or implementing requirements, guidelines and procedures for the authorisation of medicinal products that are not harmonised by ICH or VICH, the scientific or technical guidelines developed by the other organisations mentioned in Article 4.⁴¹

In the same way, the International Standardization Organization (ISO) has become legitimized as the standard-setting reference agency under WTO agreements, negotiations on new generation trade agreements seek to focus on *how and where* technical standards, requirements, and licensing are set for services and establishment. Furthermore, new generation trade agreements expand the roles of technical standards and standardization from matters addressed between industries, to providing less restrictive measures for trade as alternatives to public regulatory measures.⁴²

Another avenue for forum shopping is based on the inclusion of new chapters and clauses addressing social, environmental, labor, and gender issues as part of trade agreements. While this can be seen as means to improve trade policies and enhance the scope for enforcement (e.g., International Labor Organization conventions), it can also be seen as means to i) make trade agreements more socially acceptable, ii) limit ambition, reduce or undermine existing regulations achieved in other fora with focus on basic obligations, and iii) create a process where trade agreements are considered as appropriate forums for regulatory action on all issues.

Legitimizing Corporations as Participants in Normative and Regulatory Processes, and Condoning a New Standard of State Accountability to Corporations for Their Policy Measures

The European Union proposals for regulatory cooperation and principles in TTIP and provisions on regulatory coherence in TPP include, as a starting point, early information and engagement with stakeholders.⁴³ These proposals represent in essence slight modifications to the United States' practices of regulatory impact assessment, stakeholder consultation, and participation in the policy process.⁴⁴ The regulatory impact assessment requirements impose a substantial burden of proof on governments, which are duty-bound to take measures for transparency and stakeholder consultation. This informs stakeholders when, where, and how governments seek to restrict markets or impose regulation early in the policymaking process.

The rules on regulatory cooperation build on the practices of the United States and on initial market access rules that require public policies to show the necessity of the particular measure and that it is the least restrictive on trade and investment. New generation trade agreements essentially shift the burden of proof from corporations to public regulators, as well as make markets the norm – and public services and public regulation the exception. This is reflected also in the chapters on investment and state-owned enterprises for TTIP.⁴⁵

While stakeholder consultation could in theory stimulate public participation in the process of policy-making, stakeholder groups are likely to have very different capacities to participate in global forums. Large coalitions and corporate participation in trade negotiations tend to result in policymaking “stickiness,” with a default preference for less trade restrictive policies. Corporate representatives gain entry to these processes as participants, and they have substantial resources at hand to shape the discussions for their benefit. Industries and their consultancies can easily outspend (directly or indirectly) non-governmental organizations and international agencies participating in the same process. For example, the tobacco industry was excluded from the negotiations of FCTC.⁴⁶ It would be legitimate to question the extent to which corporate stakeholder engagement is geared more toward undermining rather than contributing to regulatory processes.

One view of investment protection is as a government watch-dog – to ensure that new legislative proposals are aligned with key stakeholder interests. While investment agreements do not directly limit the scope of global health governance, they do restrict the policy space at the national level as well as strengthen accountability toward investors in comparison to health policy priorities and public interest. Until now, the focus on investment protection procedures has concentrated on clauses that limit expropriation, yet it is likely that fair and equitable treatment (FET), or minimum standards as it is defined in TPP, will form an equally important avenue for pressure toward governments. Investment arbitration has implications for the role of public health priorities in both national and global governance. In addition to the case of tobacco, increasing concern is cast on pharmaceutical policies and the scope and potential to use compulsory licensing or limit data exclusivity to ensure the affordability of medicines.⁴⁷ This potential has been anticipated in the proposed TPP expropriation clause, which specifically enshrines a public health exception to investment arbitration as follows:

For greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.⁴⁸

NEW GENERATION TRADE AGREEMENTS AND HUMAN RIGHTS - FRIENDS OR FOES?

The role of human rights as part of trade agreements gained ground in the 1990s and the early 2000s, as human rights compliance was considered in European Union trade agreements.⁴⁹ Human rights and social clauses as part of trade deals have been implemented predominantly in trade agreements with poorer countries.⁵⁰ The role and relevance of human rights is, however, dependent on how they relate to other chapters and to the existing legal framework in countries. Furthermore, the European Union has diluted human rights obligations in the EU-Canada Comprehensive Economic and Trade Agreement (CETA) to the extent that questions have been raised whether the proposed text complied with the EU’s policy that all economic agreements must contain a human rights clause.⁵¹ This example raises the question of whether and to what extent new generation trade agreements represent a departure from the EU emphasis on human rights in trade deals. UN Special Rapporteurs on the right to health have drawn attention to specific implications of trade agreements, such as access to health care and medicines.⁵² In this context, attention has been drawn to Article 103 of the Charter of the United Nations, which stipulates that “in the event of conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Moreover, the Vienna

Convention on the Law of Treaties states that treaties have to be taken into account that apply between countries. In a similar vein, the UN Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, has emphasized “the priority of the international human rights regime, including the International Covenants as well as FAO, ILO, UNICEF and WHO conventions over conflicting obligations under trade and investment agreements.”⁵³ His report also changes the perspective from directly addressing conflicts with the right to health of individuals toward the role and capacity of governments to ensure policy space and democratic accountability for realizing human rights.

The approach in new generation trade agreements remains uncharted territory for human rights despite extensive guidance on the contours of human rights obligations by the CESCR. First, authoritative interpretations of the right to health have long held that states are obliged to protect health rights from encroachment by third parties and to take steps to regulate the business environment to support third parties’ discharge of their human rights obligations.⁵⁴ Now, new generation trade agreements tread into these sovereign waters of states and strain their right to regulate, for example to control tobacco consumption or control costs of pharmaceuticals. The most challenging issues for rights articulation arise from government measures, which seek to control costs or limit markets under the notion that human rights obligations could be met by spending more.

Second, corporate actors increasingly infiltrate the trade policy space that has historically, and appropriately, been limited to state-to-state action for negotiation, agreement, implementation, and enforcement. Human rights principles enshrined in international law derive their force on national governments from their legally binding nature and representation as a global consensus of (minimum) moral imperatives.⁵⁵ However, business actors fall outside of the traditional accountability relationship between the state and an individual.

Third, extra-judicial arbitration on matters of national public policy also pose significant challenges to the application and implementation of human rights principles. Extra-judicial arbitration (i.e., ISDS) that minimizes, if not entirely eliminates, transparency, public participation/consultation, and accountability of the proceedings is anathema to a human rights approach. Even when such proceedings are open to consultation with third parties, well-resourced corporate interests may dwarf public interest representatives in number and expertise.

Extra-judicial arbitration serves to assess investment disputes, a method that allows corporations to allege a public policy measure violates their investment rights. Concerns have been raised about the weight, if any, accorded to a state’s human rights obligations when adjudicating these claims. However, the prominent investment dispute filed by cigarette manufacturer Philip Morris against the government of Uruguay’s plain packaging law offers some hope for the salience of human rights in international arbitration. The 2016 decision by the International Centre for Settlement of Investment Disputes affirmed that governments have the discretion to take measures to protect the right to health, thereby establishing an important precedent on human rights over commercial interests.⁵⁶ Yet, the absence of explicit human rights considerations in new generation trade agreements risks offering only muted protection and promotion of human rights out of benevolence rather than legal obligation.

Ultimately, the danger exists that human rights law is under-equipped to address the novel terrain of new generation trade agreements. Because only states, and not corporate actors, are legally bound by international human rights law, authoritative guidance on human rights responsibilities of corporate actors is derived from the consensus document, Guiding Principles on Business and Human Rights (the ‘Ruggie Principles’). The Ruggie Principles were endorsed by the Human Rights Council in 2009.⁵⁷ These novel guidelines reinforce the state duty to protect against human rights abuses by third parties,

including business actors; to establish corporate actors' responsibility to respect human rights; and to advocate for improved access to effective remedies for abuses. However, no forum exists to ensure corporate accountability to and enforcement of these responsibilities.⁵⁸ Without legal recognition and an accountability mechanism, the force of human rights on business actors is significantly diluted when compared to the implications for governments.

In summary, the foci of new generation trade agreements on regulatory measures and investment protection pose new challenges from a human rights perspective. Regulatory measures encroach on states' obligations to regulate to protect the right to health. Corporate actors, who play an increasingly prominent role in new generation agreements, have human rights responsibilities despite scarce opportunities for their enforcement. Investment protection through extra-judicial arbitration sidesteps domestic law and courts, effectively muting any accountability mechanisms or human rights practices built into them. Trade and investment agreements no longer affect only specific policy measures, but now encompass regulatory processes more deeply and broadly to the extent that they can evolve to replace existing institutions and forms of governance.

Human rights law remains under equipped to address the novel terrain of new generation trade agreements in two manners. One, legitimizing corporations as actors dilutes the force of human rights framework, which is weak in addressing matters outside of the state-individual relationship. Two, extra-judicial arbitration on matters of national health policy effectively removes dispute settlement from democratic oversight of the national judiciary or other domestic body and thereby reduces, if not eliminates, important aspects of a human rights approach: transparency, participation, and accountability. Extra-judicial arbitration minimizes attention to the state's human rights obligations toward health and maximizes the focus on state-corporation interaction.

An important tension between human rights and trade rules concerns the degree to which they can be enforced and in which fora. To address these tensions, the right to health needs to have legal implications beyond rights-based approaches to health.⁵⁹ Dispute settlement in WTO and investment arbitration has not been open to human rights arguments. Furthermore, the arbitration process is not open, transparent, or balanced in relation to access to justice. Investment arbitration may also be more about power and accountability than formal judicial measures or access to justice in principle, i.e., the large financial threat of arbitration can in practice be of more concern for policy-makers than a potential violation of human rights obligations without effective sanctions.

HUMAN RIGHTS IN SUPPORT OF GLOBAL GOVERNANCE FOR HEALTH

Despite little consideration for human rights as part of global trade law, human rights do open a potential avenue to address conflicts in global health governance. While new generation agreements and international arbitration may undermine the relevance of human rights obligations, this risk can be mitigated by strengthening the role, interpretation, and position of human rights law in the context of global trade, and specifically within new generation trade agreements and in dispute settlements.

New generation trade and investment agreements, exemplified by the current TPP and TTIP negotiating text, raise concerns for global health governance and the full realization of human rights. The challenge for WHO is one of both governance and existence if trade and investment agreements shape the broader framework for public policies. Possible avenues of action include i) recognizing and complying with the right to health and human rights law in trade agreements;⁶⁰ ii) strengthening the policy space to protect and promote health and human rights considerations in trade and investment negotiations and dispute settlements;⁶¹ and iii) establishing a Framework Convention on Global Health as a new reference for rights-based global health governance.⁶² The Framework Convention on

Global Health⁶³ could bridge a number of health priorities and support a public health approach to a range of issues, from access to and rational use of medicines to sustainable health care financing and the control of antimicrobial resistance.⁶⁴ A Framework Convention on Global Health could also introduce much-needed enforcement mechanisms, solidify the role and responsibilities of non-state actors such as corporations, and adopt a rights-based approach to address the challenges in new generation trade agreements. If an international convention is required to protect the national policy space for health and to promote human rights, then there should be a strong preference to establish it under WHO's auspices. WHO's constitutional obligations and normative track-record on health could form a robust starting point for negotiating such a convention. As a convener, WHO could ensure coherence between the convention and the current normative and regulatory global health policies.

It is likely that none of these measures will alone be sufficient, and thus these initiatives should be seen as complementary measures.

In addition, the ICESCR Optional Protocol offers the potential to address breaches of the right to health that manifest as result of state action in the context of trade agreements. The ICESCR Optional Protocol is a landmark international enforcement mechanism of social rights before a quasi-judicial body that is empowered to make recommendations to ratifying states.

Until now, global governance for health has been insufficiently supported by the restricted scope of human rights in trade agreements. Going forward, building the relationship between the right to health and global governance for health will require further investigation into how regulatory processes relate to human rights and on what basis governments are required to act to honor their human rights obligations. Human rights can be an important trigger for governments to ensure health protection and universal health coverage in the face of new generation trade agreements.

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- ²⁴ CESCR. *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, para. 1(c) of the Covenant)*. UN Doc. E/C.12/GC/17, January 12, 2006, paragraph 11(1); CESCR. *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*. UN Doc. E/C.12/2002/11, January 20, 2003, para. 35.
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